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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1986

Dilip K. Paul, Petitioner

v.

Federal Mine Safety

And Health Review Commission

and

PB-KBB, Inc.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a mine engineer-designer is afforded the whistle blower protection of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)?

SALUTATION

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Dilip K. Paul, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on February 27, 1987.

PARTIES

All parties are shown in the caption.

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The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported as Paul v. FMSHRC, 812 F.2d 717 (D.C. Cir. 1987) and is re-printed in the Appendix, pages A-1 to A-10.

That opinion affirmed the decision of the Federal Mine Safety And Health Review Commission of November 21, 1985, dismissing Paul's complaint, which is reported at 7 F.M.S.H.R.C. 1784 (1985), and which is re-printed in the Appendix, pages A-13 to A-25.

That decision overruled the decision of Administrative Law Judge Joseph B. Kennedy of April 24, 1984, which denied PB-KBB's motion to dismiss Paul's complaint, which is unreported, and which is re-printed in the Appendix, pages A-26 to A-41.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction over this matter pursuant to 30 U.S.C. §816(a). The judgment of that court (Appendix, page A-1) was entered on February 27, 1987. A timely petition for rehearing and rehearing en banc was denied on April 7, 1987. (Appendix, pages A-11 and A-12) The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Federal Mine Safety and Health Act of 1977

§802. Definitions

For the purpose of this Act, the term -

(g) "miner" means any individual working in a coal or other mine;

(h) (1) "coal or other mine" means

(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground,

(B) private ways and roads appurtenant to such area, and

(C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, *.

§815. Procedure for enforcement

(c) Discrimination; complaint; hearing; order for relief.

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination

against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, * or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others

of any statutory right afforded by this Act.

STATEMENT OF THE CASE

This is a Mine Act whistle blower discrimination case brought by Paul against PB-KBB, Inc., pursuant to 30 U.S.C. §815(c). Paul was fired by PB-KBB after he blew the whistle on a dangerous design for an exploratory shaft facility [ESF] being constructed as part of the government's nuclear waste isolation project.

PB-KBB had been hired by the government to be the architect for the project, and was under contract to provide construction drawings and engineering oversight of the construction. The government's specifications for the project stated that the Mine Act and its regulations applicable to underground mines would apply. Paul, a mining engineer, was

assigned to create ventilation and escape plans that were compatible with the project's conceptual design, which had been provided by the government.

Paul complained that the conceptual design, which called for a single vertical shaft, was dangerous, since, in his view, a single shaft did not provide adequate access to the underground workings, and did not permit compliance with various mining regulations related to ventilation and escape. Paul's complaints delayed work on the project, and the changes urged by Paul threatened to increase costs.

At the time of Paul's protected activity, the project was on the designer's drawing boards within PB-KBB's engineering facility. In addition to design activity, several sites had been prospectively selected for ESFs, but site selection had not been finalized. As part of the design activity, the engineers were contacting

suppliers and construction contractors and arranging long-lead commitments for material and services. Nominal mining activity [boreholes] had occurred on some of the sites, and small amounts of mineral had been extracted. The construction drawings that were being created incorporated site specific geological and stratigraphic data provided by boreholes.

After Paul alerted the Mine Safety and Health Administration, the conceptual design was changed, as urged by Paul, to include multiple shafts rather than a single shaft.

REASON FOR GRANTING WRIT

Summary Of Argument

The Mine Act pervasively regulates the mining industry. The existence of a "mine", as defined in the Act at 30 U.S.C. §802(h)(1), is acknowledged to trigger the

coverage of the Act. If a mine existed, Paul's activities were covered by the Act, and he is protected by §815(c).

PB-KBB's engineering facility was used in mine construction, which is part of the work of extracting minerals, and thus met the literal meaning of the word "mine" as defined in the Act. Since Paul worked in that facility, he is a "miner" and is protected by §815(c).

The several sites that had been selected for ESFs were "land to be used", and thus were literally "mines". Paul acted as the "representative of miners" employed or to be employed at such "mines" and is protected by §815(c).

Even if there is no "mine", a liberal and expansive interpretation of 30 U.S.C. §815(c) would include a licensed professional mining engineer within the §815(c) terms "miner" or "representative of miners" when the engineer blows the whistle

on a danger related to the Mine Act.

An Important Question Of First Impression Before This Court

The court below has decided an important question of federal law which has not been, but should be, settled by the Supreme Court. Specifically, does the word "mine" as defined in the Mine Act at 30 U.S.C. §802(h)(1), mean what the Act says it means?

Except for the court below, every court which has considered the 1977 Act's definition of "mine" has determined that the Act means what it says; that the term is to be applied literally. The decision below, holding that restrictive language, i.e., "preexisting mine", must be incorporated into the statutory definition of "mine" so as to make it "more reasonable", is in conflict with the

decisions of several Courts of Appeal, i.e., Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir.), cert. den., 444 U.S. 1015, (1980), Cyrus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981), Harman Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Circ. 1981), and Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984).

The decision below, giving a hypertechnical and purpose defeating interpretation to §815(c), is in conflict with the holding of the Supreme Court in Whirlpool Corporation v. Marshall, 445 U.S. 1 (1980), that §815(c) is to be construed liberally.

The court below so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of the Supreme Court's power of supervision, since the court below has indulged in judicial legislation, and has

substituted its views for the views of the Congress.

The Word Means What The Act Says It Means

The Stoudt's Ferry Preparation Company purchased material that had been dredged from a river. The company separated the material into two piles, one of sand and gravel, and the other of usable coal particles. The company contested the enforcement of mining regulations against it. The Court of Appeals for the Third Circuit held that the company's facility was a mine because it met the literal meaning of the word "mine" as defined in the Act:

> Congress passed the Federal Mine Safety and Health Amendments Act of 1977 to strengthen the legislation governing coal, metallic, and nonmetallic mine already in effect, *. * Congress was not satisfied that all that could be done had been done to promote health

> and safety in the mines. Among the improvements suggested was the adoption of one statute covering the entire mining industry and containing strengthened enforcement provisions *. To meet its objectives, congress included a broad definition of "mine" in * [§802(h) of] the Act *. Commenting on this sweeping definition, the Senate Committee stated that "what is considered to be a mine and to be regulated under this Act" was to be given the broadest possible interpretation and that doubts were to be resolved in favor of inclusion of a facility within the coverage of the Act. See S.Rep.No.181, 95th Cong., 1st Sess. 1, 14, reprinted in [1977] U.S.Code Cong. & Admin. News, pp. 3401, 3414. [Legislative History] * Although it may seem incongruous to apply the label "mine" to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it -- the word means what the statute says it means.

Stoudt's Ferry at 591, 592.

The Harman Mining Corporation was cited for a violation of mining regulations which occurred on property owned by a railroad which was used by Harman for loading coal on rail cars. Harman argued that the Act's definition of a mine covered only the immediate mining process. The

Court of Appeals for the Fourth Circuit held:

> * Harman's argument is contrary to the broad definition of "mine" as set forth in the Act.

Harman Mining, at 796.

> The Act's sweeping definition, buttressed by the legislative history, supports the Commission's conclusion that the car dropping facilities and activities of Harman fall within its coverage. [citing Stoudt's Ferry]

Harman Mining, at 797.

The Cyrus Industrial Minerals Company was engaged in mine construction, and had dug a tunnel in search of talc, a mineral. After an accident, Cyrus was issued a withdrawal order pursuant to the Mine Act. Cyrus contested the order on the basis that its operation was not involved in the extraction of mineral, rather, merely the search for mineral. The Court of Appeals for the Ninth Circuit held:

> As Stoudt's Ferry, 602 F.2d at 592, indicates, it does not matter if what is included in the definition fails to conform to the conventional concept of mining: * the word means what the

statute says it means.

Cyrus Industrial, at 1118.

" * It is the Committee's intent to * include [within the term "mine operator"] individuals or firms who are engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction process * and to make clear that the employees of such * are miners within the * Act. *" [quoting Senate Report, supra. at 14.]

Cyrus Industrial, at 1119.

The Carolina Stalite Company purchased slate from a company which owned an adjacent quarry, then treated the slate with a heat process to product a light weight material used to make masonary blocks. The Court of Appeals for the District of Columbia held:

Cases decided by the Third, Ninth, and Fourth Circuits accord with our interpretation of the Act, and uniformly recognize section 3(h)'s "sweeping definition" of a mine. * In language that might have been written for Carolina Stalite, the [Stoudt's Ferry] court stated: * the word means what the statute says it means.

Carolina Stalite, at 1554, quoting Stoudt's

Ferry

PB-KBB's engineering facility is a mine because it meets the literal meaning of the word "mine" as defined in the Act:

> With respect to the threshold question of coverage or standing, the undisputed facts show [PB-KBB's] Houston office, where [Paul] worked and where the alleged protected activity occurred was a "facility" that contained "other property" both personal and intellectual including "equipment, machines, tools" and other scientific devices and data common to the practice of the profession of civil engineering. The facts further show that this "facility" and the "other property" located therein were "to be used" and, in fact, "were used" by [Paul] and other mining engineers employed by [PB-KBB] to produce an engineering design for [the government] that "was to be used in the work of extracting minerals from their natural deposits." I conclude therefore that [PB-KBB's] Houston office was a "mine" within the literal meaning of section 3 (h) (1) (C) of the Mine Act. Since [Paul] meets the statutory definition of a miner, i.e., "any individual working in a coal or other mine" he is entitled to maintain this action.

Judge Kennedy's Order, Appendix, page A-30.

According To The Court Below

"Mine" Means "Preexisting Mine"

In spite of the clear, plain, and unambiguous language of §802(h)(1), and in spite of the legislative history of the Act, which could not be stated more forcefully, the court below held:

> Paul puts great emphasis on the prospective language of §3(h)(1), arguing that the ESF sites are mines because they consist of "lands . . . to be used in" the work of mineral extraction. Likewise, in Paul's view, the Houston office is a mine because it is a "facility" at which PB-KBB uses "equipment, machines, tools, or other property . . . to be used in" the work of mineral extraction. This construction, accepted by the ALJ, stretches the language of the Act beyond its breaking point. Reading §3(h)(1) in context with the rest of the Act, we think the more reasonable interpretation is that §3(h)(1) is not applicable prior to the commencement of any mineral extraction or construction activities. The phrase "to be used in" merely refers to property that has not yet, but will be, committed to the work of extraction at a <u>preexisting</u> site or structure. * Preliminary engineering and design activities are not covered by the Mine Act. Paul contends that this interpretation will frustrate the purposes of the Act, but we disagree.

> Conceptual designs do not endanger lives or property; any hazards they pose, prior at least to their final approval or the initial stages of their implementation, are purely hypothetical. The Act was not designed to regulate ideas. To classify the Houston offices of PB-KBB or the planned ESF sites as a "mine" would, in our view, exceed the limits of the "broadest possible interpretation" of §3(h)(1).

Paul v. FMSHRC at 720, Appendix, pages A-7, A-8.

Paul argues that the legal issue is not which construction of the Mine Act is "more reasonable", but rather, which construction is correct under the rule of law as it has developed in this nation.

> A statute is open to construction only where the language used therein requires interpretation or may be reasonably considered ambiguous. * A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity.

73 AmJur2d, Statutes, §194

> The maxim 'noscitur a sociis' has no application to a statute which is too plain to admit of construction.

Id., §213

> Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not for the purpose of creating it.

Id., §195

Assuming for the sake of argument that §802(h)(1) is ambiguous, what is the correct resolution of that ambiguity?

> In the interpretation of statutes, the legislative will is the all-important or controlling factor.

Id., §145

> In the construction of a statute, the general rule is that the court may write no limitation therein. * the statute may not be restricted, constricted, qualified, or narrowed. Hence, general words are to have a general operation where the manifest intention of the legislature affords no ground for qualifying or restraining them. The legislature will be presumed to have intended to make no limitation to a statute in which it has included by general language many subjects, persons, or entities without limitation.

Id., §199

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly (sic.) interpretation, and it is the

> intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

Senate Report, supra. at 14.

When a court ignores the plain words of a statute and the clearly and powerfully stated will of Congress, the result is judicial legislation. Nothing could be more unreasonable than for the courts to discover a "breaking po.nt" in a statute where none exists. In support of its "breaking point" theory, the court below holds that engineering and design activities are not covered by the Mine Act. The court ignores the provisions of §820(f) of the Act, which provide:

> Whoever knowingly makes any false statement, representation, or certification in any * plan * filed or required to be maintained pursuant to this Act shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than five years, or both.

30 U.S.C. §820(f)

If Paul followed PB-KBB's

instructions and created unsafe plans which eventually cost miners' lives, could he defend himself against criminal charges by arguing that the dangers he ignored were "purely hypothetical"? It is absurd that there should be a narrower scope of coverage for §815(c) than §820(f).

At the time Paul was fired, he was not playing with abstract ideas. Paul was creating a ventilation plan and an escape plan for a mine that was to be built. These plans were required by the mine regulations to be created prior to any pick and shovel work.

> 30 C.F.R. §57.5-20 Mandatory. A plan of the mine ventilation system shall be set out by the operator in written form. *

> 30 C.F.R. §57.11-53 Mandatory. A specific escape and evacuation plan * shall be developed by the operator and set out in written form. *

The mine plans being created by Paul were required to comply with the mandatory standards of the Mine Act.

> As I review the matter the law was intended not only to preclude "building in" hazards at the construction site but also at the design site. Otherwise, why the requirement that the design comply with the mandatory standards.

Judge Kennedy's Order, page A-33.

By the plain words of the Act and its regulations, planning is an activity regulated by the Act. Additional support for this view is provided by the legislative history:

> Such * plans * are the best method of regulating such complex and potentially multifaceted problems as ventilation * and the like.

Senate Report, supra. at 25.

The court below took the view that Paul's whistle blowing activity did not further the health and safety of miners, as the dangers posed were "purely hypothetical". So were the dangers posed by the conceptual design of the seals on the shuttle's boosters. All the dangers a designer deals with are "purely hypothetical", since future events of

varying degrees of uncertainty must precede the dangerous events. Engineers understand that the mere passage of time will supply the conditions necessary to cause the "purely hypothetical" dangerous event. In other words, Murphy's Law applies: "What can happen, will happen."

Paul would have failed in his duty to his employer, his fellow miners, and his country if he had kept silent about the project's dangers until the beginning of construction. All the planning and work done to that point would have become useless. In such an event, the project would likely either be abandoned, or else be built as planned, dangers and all.

Consider the holding of the Illinois Appellate Court in Poreba v. Illinois Midland Coal Company, 156 Ill. App. 140 (1910):

> A dangerous place or condition in a mine need not be present or immediately impending. Safe and proper mining demands that probable as well as

present conditions be guarded against. Id., at 143.

Consider the views of Judge Kennedy, a person well acquainted with the dangers of mining and the effects of design activities on mine safety:

> It is axiomatic that sound engineering is as essential to the health and safety of miners as education, training or MSHA's enforcement of the mandatory standards. The very fact that MSHA admits to an inability to police adequately the conduct involved in Mr. Paul's complaint argues strongly for allowing Mr. Paul to proceed, *. As the courts have noted: "Safety costs money. The temptation to minimize compliance with safety regulations and thus shave costs is always present. The miners are both the most interested in health and safety protection, and in the best position to observe compliance or noncompliance with safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance. Miners who insist on health and safety rules being followed even at the cost of slowing down production, are not likely to be popular with mine foremen or top management. Only if miners are given a realistically effective channel of communication re health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be

effectively enforced. Phillips v. IBMA 1 MSHC 1154, 1158, 500 F.2d 772 (D.C. Cir. 1974), cert den 420 U.S. 938 (1975)

Judge Kennedy's Order, page A-32.

Consider the views of Commissioner Lastowka of the Mine Commission:

> There are, however, several well-established countervailing considerations to be weighed: the avowed remedial purpose of the Mine Act; the mandate that section 105(c)'s protections against retaliation for safety-related activities be broadly construed; and the fact that section 105(c)'s proscriptions apply to "persons", not just "operators". Given these considerations, I am not willing, before any factual investigation by the Secretary of Labor or hearing before the Commission, to rule out the possibility that a cause of action may arise under the Mine Act when a person alleges that he has voiced safety concerns over the design of a structure or facility to be used in mining and further alleges that he has been retaliated against simply because those safety concerns were raised.

Commission Decision, Appendix, pages A-24, A-25.

The Court Below Refused To Construe §815(c) Expansively

The Supreme Court has had occasion to consider the legislative history of 30 U.S.C. §815(c). In the case of Whirlpool Corp. v. Marshall, at 13, n. 18, the Supreme Court, after considering the legislative history of §815(c) of the Mine Act, determined that 29 U.S.C. §660(c) and 30 U.S.C. §815(c) were "parallel" anti-discrimination statutes, and held that 29 U.S.C. §660(c), should be liberally construed.

> [S]afety legislation is to be liberally construed to effectuate the congressional purpose.

Id., at 13.

An example of a liberal and expansive construction of §815(c) is Donovan v. Stafford Const. Co., 732 F.2d 954 (D.C. Cir. 1984), wherein the court

held that a whistle blower was protected by §815(c) irrespective of whether she was a miner as defined by the Act. The court below, for reasons that are unclear, declined to apply the holding of Stafford Const. to this case. Other authorities for the proposition that §815(c) is to be construed expansively include Brock on Behalf of Parker v. Metric Construction Co., 766 F.2d 469 (11th Cir. 1985) and Boich v. FMSHRC, 704 F.2d 275, vacated on other grounds, 719 F.2d 194 (6th Cir. 1983)

The legislative history makes it clear that Congress did not intend that §815(c) be construed literally, in a hypertechnical and purpose defeating manner:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. *

> [815(c)] prohibits any discrimination against a miner for exercising any right under the Act. It should also be noted that the class protected is expanded from the current Coal Act. The prohibition against discrimination applies to miners, applicants for employment, and the miners' representatives. * [T]he Committee intends [815(c)] to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.

Senate Report, supra. at 35, 36.

Authority for the proposition that the protection afforded by §815(c) is not limited to the classes of persons called out in the statute is also found in cases dealing with parallel anti-discrimination provisions.

In Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977), a non-employee, non-applicant was protected by the whistle blower provision of Title VII, 42 U.S.C. §2000e-3, which literally applies only to "employees or applicants for employment".

In Clark & Hinojosa, 247 NLRB 710,

103 LRRM 1205 (1980), the NLRB held that a non-employee was protected by the whistle blower provision of the NLRA, 29 U.S.C. §158(a)(4), which literally applies only to "an employee". Supervisors, while not employees within the scope of 29 U.S.C. §158(a)(4), have been protected from retaliation for protected activity under the NLRA. See for example, Pederson v. NLRB, 234 F.2d 417 (2nd Cir. 1956). See also, Vol I. The Developing Labor Law 262, (C.Morris, ed., 2d Ed., 1983) cited by Stafford Const., at 958.

In Dunlop v. Carriage Carpet Shop, 548 F.2d 139 (6th Cir. 1977), a non-employee was protected by the whistle blower provision of the FLSA, 29 U.S.C. §215(a)(3), which literally applies only to "employees".

The regulations promulgated pursuant to OSHA, 29 U.S.C. §§651, provide that the protection afforded an "employee"

by 29 U.S.C. 660(c)(1) is also available to other persons. See 29 C.F.R. §1977.5. See also 66 ALRFed 650, OSHA - Exercise Of Employee Rights.

Finally, because of the different legislative histories of the different provisions of the Mine Act, it is not incorrect to apply different meanings to the same words in different parts of the Act.

> In light of the different remedial purposes of the Titles of the Act, the construction placed on particular definitions in the Act, need not be mechanically applied to all Titles of the Act.

Bituminous Coal Operators' Ass'n v. Hathaway, 406 F.Supp 371, 375 (D.C. Va. 1975) aff'd 547 F.2d 240 (4th Cir. 1977)

Thus, it is not inconsistent with the legislative history of the Mine Act to declare that a mining engineer is a miner for the purpose of §815(c).

CONCLUSION

If the decision of the court below is allowed to stand, it will discourage mine engineer-designers from being strong advocates for mine safety. Paul says this will have a serious effect on mine safety.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert M. Wood
Counsel for Petitioner
1310 Trailwood Village Dr.
Kingwood, Texas
Phone (713) 358-5261

Dated: May 12, 1987.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1801

DILIP K. PAUL, PETITIONER

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, RESPONDENT

PB-KBB, INC., INTERVENOR

Petition for Review of an Order of the Federal Mine Safety and Health Review Commission

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Argued October 31, 1986

Decided February 27, 1987

Robert M. Wood for petitioner.

Anson D. Phipps for intervenor, PB-KBB, Inc.

L. Joseph Ferrara, Acting General Counsel, Federal Mine Safety and Review Commission entered an appearance for respondent.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WALD, *Chief Judge*, WILLIAMS, *Circuit Judge*, and WILL,* *Senior District Judge*.

Opinion for the Court filed by *Senior District Judge* WILL.

WILL, *Senior District Judge*: Petitioner Dilip K. Paul seeks review of a decision by the Federal Mine Safety and Health Review Commission ("Commission") holding that he is not a "miner" within the meaning of § 3(g) of the Federal Mine Safety and Health Act ("Mine Act" or "Act"), 30 U.S.C. § 802(g), and that he has no standing to sue under § 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1). For the reasons stated below, we affirm.

I.

Paul is a professional mining engineer who was employed by PB-KBB, Inc., an engineering firm. In 1981, PB-KBB became involved in an experimental program for the underground storage of nuclear waste. The project, known as the Exploratory Shaft Facility ("ESF"), was sponsored by the Department of Energy and overseen by the Department's agent for the project, the Batelle Memorial Institute ("Batelle"). Batelle contracted with PB-KBB to plan and design the ESF. Under the contract, PB-KBB agreed to provide professional engineering services to prepare designs for the construction of the exploratory shafts.

The ESFs were designed to permit testing of underground salt formations as a medium for storing nuclear waste. The plan was to have three ESFs ranging in depth from 2200 to 3000 feet. After the initial testing, one ESF was to be enlarged by the extraction of approximately five million cubic feet of salt. This space was

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* Of the United States District Court for the Northern District of Illinois, sitting by designation pursuant to 28 U.S.C. § 294(d).

then to begin receiving nuclear waste. At the time of oral argument, the final site selection for the construction project had not yet been made.

Paul worked at PB-KBB's Houston, Texas office. He was assigned to conduct a study of the proposed shaft's ventilation system. The design criteria furnished by Batelle stated that the project was subject to the Mine Act and that the ventilation system would comply with the mandatory safety standards for underground mines, 39 C.F.R. pt. 57, promulgated under the Act. During the course of the study, Paul concluded that Batelle's design criteria were inconsistent with the federal standards. In Paul's opinion, these inconsistencies posed potential safety hazards. Paul was also concerned about potential liability from unsafe conditions at the ESFs.

Paul's supervisors disagreed with his interpretation of the regulations and the disagreement led to Paul's removal from the ESF project. Subsequently, Paul wrote a memorandum to his supervisors setting forth his position on the project's noncompliance with the federal standards. Twelve days later, on August 18, 1982, Paul was fired from PB-KBB. PB-KBB said the firing was due to Paul's incompetence and lack of productivity; Paul, in a complaint filed with the Secretary of Labor, claimed that the firing was in reprisal for his stand on the project's potential safety hazards.

The Secretary of Labor denied Paul's claim, finding that Paul did not work in a "mine" as defined in § 3 (h) (1) of the Act. Paul then filed an action before the Commission under 30 U.S.C. § 815(c)(3). On cross-motions for summary judgment and PB-KBB's motion, in the alternative, to dismiss for lack of jurisdiction, the ALJ found that PB-KBB's Houston office was a "mine," that Paul was a "miner," and that Paul therefore had standing to bring the action. Accordingly, the ALJ denied the motions and set the case for further proceedings.

Before further proceedings could be had, however, the Commission granted PB-KBB's petition for interlocutory review and reversed the ALJ. A majority of the three member panel found that the work of producing a preliminary engineering design did not constitute mining activity. Because no mine was in existence at the time of Paul's discharge, the majority reasoned, Paul was not a miner and the Mine Act provided him with no job protection. The third panel member concurred on the ground that the ESFs, "would not, when and if brought to fruition, be subject to the Mine Act." Accordingly, on November 21, 1985, the Commission dismissed Paul's complaint for lack of jurisdiction.

II.

The gist of Paul's complaint is that he was fired for "blowing the whistle" on PB-KBB. Assuming his allegations to be true, as we must on review of an order of dismissal, the question becomes whether Paul is covered by the employee protective provisions of § 105(c)(1) of the Act. Section 105(c)(1) states that "No person shall discharge . . . any miner [or] representative of miners . . . because such miner [or] representative of miners . . . has filed or made a complaint under or related to this chapter." 30 U.S.C. § 815(c)(1).[1] Paul maintains that, under this section, he was a "miner [or] representative of miners" who could not be discharged for initiating a Mine Act complaint. To assess this argument, we begin by consulting the statutory definitions.

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[1] Section 105(c)(1) provides in its entirety:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or

Section 3(g) of the Act defines "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). Thus, to be a miner one must work in a mine; *a fortiori*, a "representative" of miners must act on behalf of individuals who work in a mine.[2] The next section of the Act, § 3(h)(1), defines "coal or other mine" in pertinent part as follows:

> "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form . . ., (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property . . . on the surface or underground, used

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made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1).

[2] "Representative of miners" is defined in the regulations as:

> (1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and
>
> (2) "Representatives authorized by the miners," "miners or their representative," "authorized miner representative," and other similar terms as they appear in the Act.

30 C.F.R. § 40.1(b).

> in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form . . . or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals . . . .

30 U.S.C. § 802(h)(1).

In Paul's view, both the Houston office of PB-KBB and the prospective ESF sites qualify as mines under the above definition. Conceding that PB-KBB engages in no more than preliminary design activities at its Houston office, Paul urges us to read the definition expansively to include these activities. Paul would also have us interpret the phrase "to be used in" as broad enough to encompass the ESFs, even though no ESFs exist at this time.

Paul correctly points out that we have previously construed "mine" expansively, consistent with the purposes of the Mine Act. In *Donovan v. Caroline Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984), this court held that Stalite, a slate gravel processing facility located adjacent to a quarry, was a mine subject to the Act. Though the slate was extracted not by Stalite but by the quarry, which was an independent business operation, the court found that the Act was not restricted to companies that actually engaged in mineral extraction. Since as a matter of "industrial and economic reality" the two facilities formed "a unified mineral processing operation," the court concluded that the Act covered Stalite's processing activities. *Id.* at 1551.

The *Stalite* court noted that the legislative history of the Mine Act supported an expansive reading of "mine" and that previous cases from other circuits had found post-extraction mineral preparation activities to fall within the Act's ambit. *Id.* at 1553-54; *see Harman Mining Corp. v. Federal Mine Safety & Health Review*

Comm'n, 671 F.2d 794 (4th Cir. 1981) (loading of coal that already had been extracted and prepared took place at a "mine"); *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3d Cir. 1979) (operation that purchased and prepared minerals dredged from riverbed by state was a "mine") *cert. denied*, 444 U.S. 1015 (1980); S. Rep. No. 181, 95th Cong., 1st Sess. 14, *reprinted in* 1977 U.S. Code & Admin. News 3401, 3414 ("[I]t is the Committee's intention that what is considered to be a mine and to be regulated under the Act be given the broadest possible interpretation.").

None of these cases, however, and nothing in the legislative history supports the application of the Act to the facts of this case. Whether we focus on the Houston office or the prospective ESF sites, the simple facts remain that no mineral has been extracted from the ground, no construction work has taken place, indeed, no final site selection has been made in connection with the ESF project. Unlike the post-extraction activities considered in *Stalite* and its predecessors, PB-KBB's work is wholly conceptual in nature, preceding the very existence of a mine location. For all we know ground may never be broken on the ESF project.

Paul puts great emphasis on the prospective language of § 3(h)(1), arguing that the ESF sites are mines because they consist of "lands . . . to be used in" the work of mineral extraction. Likewise, in Paul's view, the Houston office is a mine because it is a "facility" at which PB-KBB uses "equipment, machines, tools, or other property . . . to be used in" the work of mineral extraction. This construction, accepted by the ALJ, stretches the language of the Act beyond its breaking point. Reading § 3(h)(1) in context with the rest of the Act, we think the more reasonable interpretation is that § 3(h)(1) is not applicable prior to the commencement

of any mineral extraction or construction activities. The phrase "to be used in" merely refers to property that has not yet, but will be, committed to the work of extraction at a *preexisting* site or structure.[3]

We need not decide whether the ESFs, once constructed or in the process of construction, would be a mine. We rest our decision on a more fundamental ground. Preliminary engineering and design activities are not covered by the Mine Act. Paul contends that this interpretation will frustrate the purposes of the Act, but we disagree. Conceptual designs do not endanger lives or property; any hazards they pose, prior at least to their final approval or the initial stages of their implementation, are purely hypothetical. The Act was not designed to regulate *ideas*. To classify the Houston offices of PB-KBB or the planned ESF sites as a "mine" would, in our view, exceed the limits of the "broadest possible interpretation" of § 3(h)(1). S. Rep. No. 181, *supra*, at 14, 1977 U.S. Code Cong. & Admin. News at 3414.

Paul raises two final arguments. First, he maintains that even if he is not a miner or representaive of miners he is entitled to proceed under § 105(c)(1). In Paul's view, § 105(c)(1) protects from retaliatory discharge any "person" who files a Mine Act complaint. In support, Paul relies on *Donovan v. Stafford Construction Co.*, 732 F.2d 954 (D.C. Cir. 1984), in which this court found that Anderson, a bookkeeper-secretary, was protected by § 105(c)(1). The distinction Paul fails to mention is that Anderson worked at a mine. Though she was not directly involved in the work of extraction, we found that the ALJ correctly treated her as a "miner."

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[3] This interpretation finds indirect support in the jurisdictional provision of the Act, 30 U.S.C. § 803, which extends the Act's coverage to mines "the products of which enter commerce [or] . . . affect commerce" but says nothing about prospective effects upon commerce.

Paul, by contrast, is not a miner nor a representative of miners, for reasons we have explained.[4]

Stafford contains some additional language which may be read to support Paul's view, however. Anderson was fired for refusing, upon request by her employer, to tell Mine Safety and Health Administration investigators that her co-worker had been fired not for filing a safety-related complaint, but as part of a general reduction in force. The court, having found that Anderson was a miner, went on to state:

> Furthermore, even if Anderson did not qualify as a "miner" within the meaning of the Act, she would be protected against retaliation for providing testimony in federal mine safety proceedings involving the Company. *Cf.* I *The Developing Labor Law* 262 (C. Morris ed., 2d ed. 1983) (noting that the NLRB has held that even employees who are otherwise not covered under National Labor Relations Act are protected against retaliation for filing charges or giving testimony in Board proceedings).

Id. at 958. The meaning of this passage is not entirely clear. The *Stafford* court may simply have assumed that one who testifies in mine safety proceedings would perforce be, if not a miner, a representative of miners. Anderson, for example, by declining to give false testimony, was clearly advancing the miners' interest in a safe working environment. Alternatively, the court may have been saying that some persons are protected under § 105(c)(1) for assisting in Mine Act enforcement activities even though they are neither miners nor representatives of miners. In any event, we do not think the *Stafford* court intended to extend § 105(c)(1) protections to non-miners and non-representatives of miners prior to the commencement of any mining activity.

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[4] There is a third class of individuals protected by § 105(c)(1), but Paul is obviously not an "applicant for employment." 30 U.S.C. § 815(c)(1).

Finally, Paul appears to argue that he is entitled to proceed under § 105 since PB-KBB is a mine "operator" within the meaning of § 3(d) of the Act. This argument takes us through the same thicket from which we have already emerged, however. The definition of "operator," like that of "miner," presupposes the existence of a "mine." *See* 30 U.S.C. § 802(d).

CONCLUSION

Since neither the offices of PB-KBB nor the prospective ESF sites are a "mine," Paul cannot be a "miner" as defined in § 3(g) of the Mine Act nor a "representative of miners." Further, Paul is not protected as a Mine Act complainant prior to the existence of a mine or the selection of a mine site. As such, Paul has no cause of action under § 105(c)(1) and the Commission correctly found itself lacking in jurisdiction. Accordingly, the Commission's order dismissing Paul's complaint is

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1801 September Term, 1986

Dilip K. Paul

v.

Federal Mine Safety and
Health Review Commission

Before: WALD, Chief Judge; WILLIAMS, Circuit Judge; WILL*, Senior District Judge, U. S. District Court for the Northern District of Illinois

O R D E R

Upon consideration of petitioner's petition for rehearing, it is ORDERED, by the Court, that petitioner's petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

* Sitting by designation pursuant to 28 U.S.C. Section 294(d)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1801 September Term, 1986

Dilip K. Paul

v.

Federal Mine Safety and
Health Review Commission

Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges; Will*, Senior District Judge, U. S. District Court for the Northern District of Illinois

O R D E R

Petitioner's suggestion for rehearing en banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that petitioner's suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

* Sitting by designation pursuant to 28 U.S.C. Section 294(d)

FEDERAL MINE SAFETY

AND HEALTH REVIEW COMMISSION

1730 K Street NW, 6th Floor

Washington, D.C. 20006

November 21, 1985

DILIP K. PAUL :

:

v. : Dkt No. CENT 83-42-DM

:

PB-KBB, INC. :

Before: Backley, Acting Chairman; Lostawka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case is before us on interlocutory review. It involves a

complaint of discrimination filed by Dilip Kumar Paul against P.B.-K.B.B., Inc. ("PB-KBB"). The complaint alleges that PB-KBB discharged Paul, a mining engineer, in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (1982)("Mine Act"), because Paul reported to PB-KBB that a preliminary, exploratory shaft design violated certain mandatory ventilation standards for underground nonmetal mines. PB-KBB filed a motion to dismiss Paul's complaint for lack of jurisdiction. A Commission administrative law judge denied the motion and held that PB-KBB's Houston, Texas office was a "mine" within the meaning of section 3(h)(1)(C) of the Mine Act, and that Paul was a "miner" within the meaning of section 3(g) of the Act because

he worked in the Houston office. 1/ Order Denying Respondent's Motion to Dismiss (April 24, 1984) (unpublished). For the following reasons, we find that the judge erred in concluding that Paul is a miner and has standing to sue under the Mine Act, and we dismiss the complaint of discrimination.

PB-KBB, Inc. is a joint venture between two engineering firms -- Parsons, Brinkerhoff, Quade and Douglas of New York

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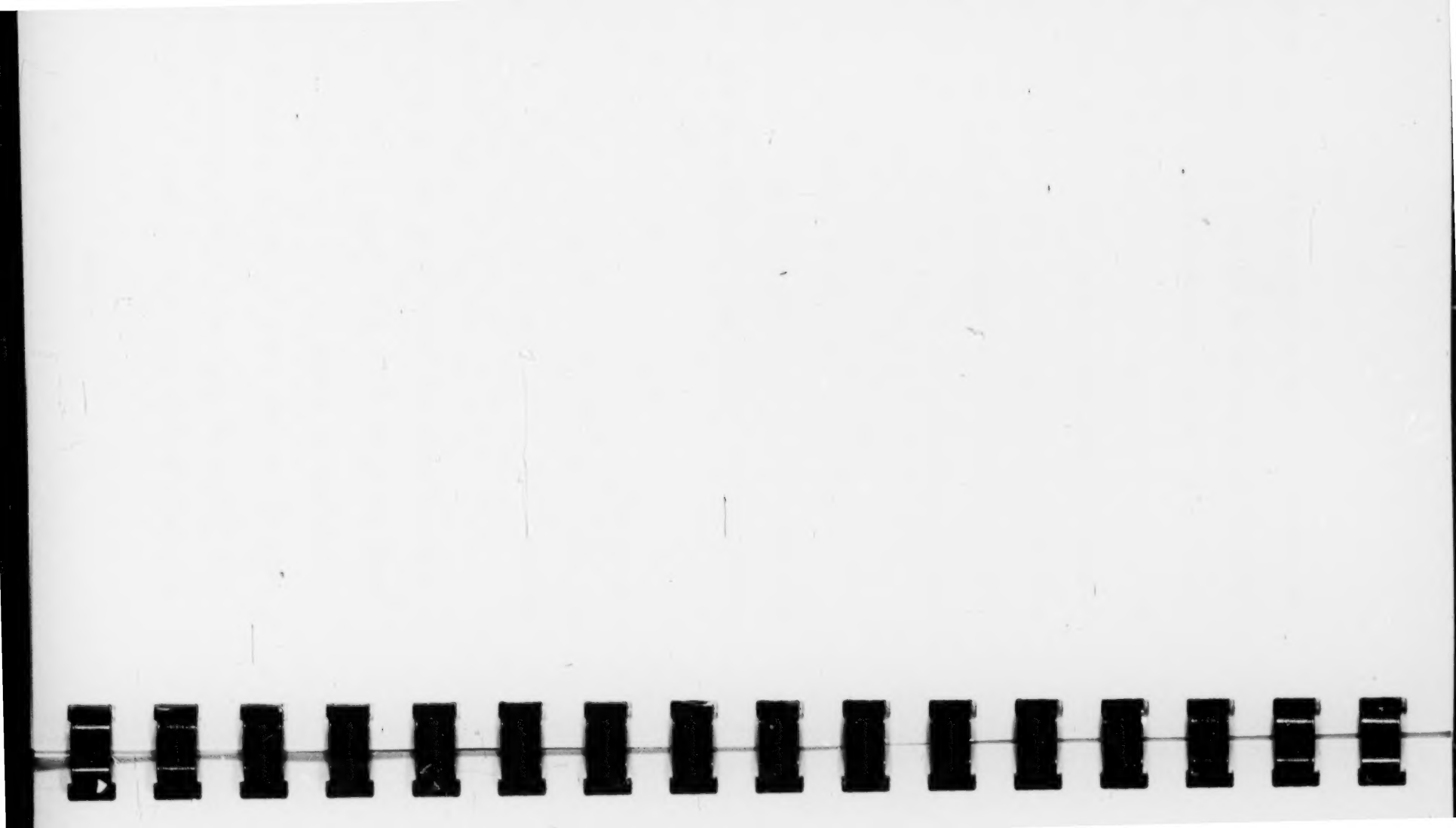
1/ Section 3(h)(1), 30 U.S.C. §802(h)(1), defines "coal or other mine" as:

> (A) an area of land from which minerals are extracted in modified (sic.) [nonliquid] form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands,



Footnote 1 end

excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid for, or if in liquid form, with workers underground, or used in, or to be used, the milling of such minerals, or the work of preparing coal or other minerals, and includes coal preparation facilities.

Section 3(g) of the Mine Act, 30 U.S.C. §802(g), defines a "miner" as "any individual working in a coal or other mine."

and Kavernen Bau-Und Betriebs - Gambh of West Germany. In 1981, the United States government, through the Department of Energy ("Department"), undertook an experimental program for the underground storage of toxic waste, particularly nuclear waste. The Department hired the Battelle Corporation of Columbus, Ohio to be the government's agent to oversee this program. After receiving the contract from the Department, Battelle set about soliciting bids for a project known as the Exploratory Shaft Facility. This project entails the planning, construction, and the experimental operation of a shaft and tunnels in salt formations for the long term storage of nuclear waste.

In order to respond to Battelle's bid request, PB-KBB entered into another joint venture with Parsons, Brinkerhoff,

Quade and Douglas. 2/ PB-KBB bid on and won the right to plan and design the Exploratory Shaft Facility. The contract between PB-KBB and Battelle calls upon PB-KBB to furnish all qualified personnel, equipment and materials necessary to implement the contract. The contract requires PB-KBB to provide professional engineering services to prepare designs for the construction of an experimental storage facility, as well as to provide managerial, administrative, and other services to support the design activities. The contract prohibits PB-KBB from engaging in any construction or supervision of the construction of any shaft and tunnels that may ultimately be sunk.

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2 This second joint venture is also named PB-KBB, Inc. It is the respondent in this proceeding.

Paul was a mining engineer with 22 years experience. He was hired by PB-KBB on May 11, 1981. On June 18, 1982, he was assigned to work on the Exploratory Shaft Facility project. The work was done at PB-KBB's Houston office. During the course of this assignment Paul performed a study in connection with the creation of a ventilation plan for the proposed shaft. While performing the study, Paul consulted the mandatory safety and health standards for underground metal and nonmental mines promulgated by the Secretary of Labor through the Mine Safety and Health Administration ("MSHA"). 30 C.F.R. Part 57. Paul became concerned that the shaft, as designed, could not comply with a number of ventilation standards. He reported his concerns to his supervisors orally and in writing. As a result of these reports, Paul was discharged on July 29, 1982. After his discharge, Paul was rehired and

assigned to work on other projects. On August 6, 1982, Paul wrote a memorandum to his supervisors concerning his view of the Exploratory Shaft Facility project's noncompliance with the MSHA ventilaion standards. On August 16, 1982, he was discharged again.

After Paul was discharged the second time, he filed a complaint of discrimination with the Secretary of Labor ("Secretary") claiming that he was fired because of his safety complaints in contravention of section 105(c)(1) of the Mine Act. 3/ The Secretary investigated

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3/ Section 105(c)(1), 30 U.S.C. §815(c)(1), provides:

> No person shall discharge or in any manner discriminate against or

Footnote 3 cont.

> cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any ... mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, ... or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any

Paul's complaint and concluded that Paul's discharge did not violate section 105(c)(1). The Secretary notified Paul of his determination but advised Paul that Paul could bring a complaint of discrimination on his own behalf before the Commission. Thereafter, pursuant to

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Footnote 3 end

> proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

section 105(c)(3) of the Mine Act Paul initiated this action. 4/ PB-KBB then filed its motion to dismiss for lack of

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4/ Section 105(c)(3), 30 U.S.C. §815(c), provides in part:

> Within 90 days of the receipt of a complaint ... the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission....

subject matter jurisdiction and following the judge's denial of that motion this matter came before us.

In denying PB-KBB's motion, the judge found that the office where Paul worked and where the alleged protected activity occurred was "a 'facility' that contained 'other property' ... including 'equipment, machines, tools' and other scientific devices and data common to the practice of the profession of civil engineering," and that "this 'facility' and 'other property' ... were 'to be used' and, in fact 'were used' by [Paul] and other mining engineers ... to produce an engineering design ... that 'was to be used in the work of extracting minerals from their natural deposits.'" The judge concluded therefore that PB-KBB's Houston office was a mine within the literal meaning of section 3(h)(1)(C) of the Mine Act and that because Paul met the statutory

definition of a miner, i.e., "any idividual working in a coal or other mine," he was entitled to maintain this action.

While we have recognized that the definition of "coal or other mine" provided in section 3(h) of the Mine Act is expansive and is to be interpreted broadly, Oliver M. Elam, 4 FMSHRC 5, 6 (January 1982), the inclusive nature of the Act's coverage is not without bounds. Accordingly, given the facts in this case we conclude that PB-KBB's Houston office during the period relevant to Paul's complaint was not a "mine".

It may well be, as our concurring colleague suggests, that the exploratory shaft being designed would, even when completed, not fall within the Mine Act's definition of a mine. We are not prepared to premise our reasoning here on that

conclusion, particularly because a more fundamental and immediate reason requires us to reach the conclusion that no mine, as defined by the Act, was in existence at the time of Paul's discharge. Put most simply - no mine, no miner, no Mine Act coverage.

In this regard, PB-KBB's Houston office contained equipment and other property which was used in producing only a preliminary engineering design for the construction of a shaft and tunnels for storing nuclear waste. The design never left the drawing board. It was never implemented. Indeed, a site at which to construct the shaft was not selected, and even if a site had been chosen, PB-KBB was barred by contract from participating in construction of the facility. Moreover, the work of Paul in drafting a preliminary engineering design for the experimental nuclear storage facility clearly is not the

type of activity that Congress intended to be regulated by the Mine Act. See Senate Subcomittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative Hitory of the Federal Mine Safety and Health Act of 1977 (1978) ("Legis. Hist.") at 1316.

In sum, the facilities and equipment of the subject engineering firm designing a storage facility for nuclear waste are not entities "in use in connection with mining activities." Legis. Hist., id. The design work that was performed by Paul at PB-KBB's Houston office on an exploratory project is simply too far removed from what reasonably can be regarded as mining activity in order to qualify for Mine Act coverage.

According, we hold that Paul was not working in a "mine" as that word is

defined in section 3(h)(1) and, consequently, that he was not a "miner" as that word is defined by section 3(g) of the Mine Act. Paul's discrimination complaint fails for lack of jurisdiction. The judge's decision is reversed and the complaint is dismised. 5/

Richard V. Backley
Acting Chairman

L. Clair Nelson
Commissioner

5/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. §823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

Lastowka, Commissioner, concurring:

I agree with my colleagues that the judge erred in denying respondent's motion to dismiss. I believe, however, that they err by basing their dismissal on too broad a basis. I would limit dismissal to the most narrow, fundamental ground available and leave for a case in which it is squarely raised consideration of the novel question that they prematurely address.

If I read my colleagues' opinion correctly, they are not as concerned with the type of facility being designed as they are with the fact that the facility was in the "design stage." My emphasis is precisely the opposite and I need only quote from complainant Paul's brief to demonstrate why he has no claim under the Mine Act. He states:

These exploratory shafts were designed for the immediate purpose of allowing scientific tests of the suitability of salt deposits as a medium for storage of highly radioactive nuclear waste, with the ultimate purpose being utilization as a repository for such waste. The exploratory shafts were to be from 2200 feet to 3000 feet in depth, with tunnels and various underground workshops. Following the testing phase, the selected site was to be enlarged by the extraction of five million cubic feet of salt over a period of several years. The extracted mineral might be stored or sold, as there are no legal prohibitions against the government selling its salt.

Following enlargement, the repository would begin to receive the nuclear waste, utilizing underground workers

> for handling and storage functions, for approximately twenty five years or for so long as there was a capability or a need to store such material.

Complainant's Brief on Interlocutory Review at 3.

Does the foregoing passage describe a "mine"? The administrative law judge believed so because complainant was working to produce a design that "was to be used in the work of extracting minerals from their natural deposits." Order of Administrative Law Judge at 4. Under this same rationale, however, every construction project involving excavation of minerals from the earth, be it construction of downtown office buildings, subways, or tunnels would constitute "mining" subject to the Mine Act and persons designing such projects would be "miners". Needless to say, in enacting

the Mine Act Congress evidenced no intent to regulate these types of construction activities.

In order to avoid unintended results that can flow from a literal reading of the Mine Act's broad definition of "mine," the Commission previously has recognized that "inherent in the determination of whether an operation properly is classified as mining is an inquiry not only into whether the operation performs one or more of the listed work activities, but also into the nature of the operation performing such activities." Oliver M. Elam, Jr. Co., 4 FMSHRC 5, 7(January 1982) (emphasis in original). Compare Elam with Alexander Bros., Inc., 4 FMSHRC 541 (April 1982).

An examination of the nature of the operation described by complainant, i.e.,

the construction of a nuclear waste storage facility for the U. S. Department of Energy, compels the conclusion that a "mine" within the meaning of the Mine Act is not and will not be present. It may very well be that various types of underground excavation and tunneling projects pose safety concerns similar to those encountered in underground mining. For this reason safe engineering and design practice would dictate consideration of pertinent federal mine safety and health regulations. In fact, this was required by the contract under which complainant was working. Nevertheless, the mandatory federal safety standards governing such underground construction activities most likely would be those promulgated pursuant to the more broadly applicable Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq rather than the Mine Act. See, e.g., 20 C.F.R. Subpart S, §1926.800, Tunnels and shafts.

Because the project on which complainant was performing design work would not, when and if brought to fruition, be subject to the Mine Act, on that basis alone I rest my conclusion that Paul's complaint under the Mine Act must be dismissed. As my colleagues state, "no mine, no miner, no Mine Act coverage." Slip. op. at 4.

Having stated the basis of my conclusion, I will briefly explain why I am troubled by that of my colleagues. They apparently attach controlling weight to the fact that the project at issue was in only a preliminary design stage with no actual

construction having yet been undertaken. 1/

1/ This consideration apparently also was controlling in the view of MSHA. In advising complainant of its refusal to investigate his complaint, it was explained:

> .... MSHA has no authority in this case to regulate the design stage of facility construction. MSHA's regulatory authority with respect to the planned exploratory shafts would commence, if at all, with actual physical construction. Accordingly, even if the firm did order you to design a facility or structure in such a way that the facility or structure would not comply with MSHA standards, this does not constitute a violation of those standards or the Mine Act.

Letter from Associate Solicitor for Mine Safety and Health to complainant, November 24, 1982.

It may very well be that because at such a preliminary stage the products or operations of a mine are not yet entering or affecting commerce, the minimal jurisdictional threshold set forth in Section 4 of the Mine Act could not be met. 30 U.S.C. §803. There are, however, several well-established countervailing considerations to be weighed: the avowed remedial purpose of the Mine Act; the mandate that section 105(c)'s protections against retaliation for safety-related activities be broadly construed; and the fact that section 105(c)'s proscriptions apply to "persons", not just "operators". Given these considerations, I am not willing, before any factual investigation by the Secretary of Labor or hearing before

the Commission, to rule out the possibility that a cause of action may arise under the Mine Act when a person alleges that he has voiced safety concerns over the design of a structure or facility to be used in mining and further alleges that he has been retaliated against simply because those safety concerns were raised. That issue warrants further consideration in an appropriate case.

James A. Lastowka
Commissioner

FEDERAL MINE SAFETY

AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 Skyline, 10th Floor

5203 Leesburg Pike

Falls Church, Virginia 22041

April 24, 1984

DILIP K. PAUL	:	DISCRIMINATION
Complainant	:	PROCEEDING
v.	:	Dkt CENT 83-42-DM
PB-KBB, INC.	:	MSHA CASE NO
Respondent	:	MD 83-45

ORDER DENYING RESPONDENT'S MOTION TO DISMISS; THE PARTIES MOTIONS' FOR SUMMARY DECISION; AND SETTING THIS MATTER FOR A PREHEARING CONFERENCE

This case involves a novel question of coverage. Namely, whether a mining

engineer employed by a firm of architect/engineers in an office in Houston, Texas was a "miner" within the meaning of the Mine Safety Law at the time he reported that a preliminary exploratory shaft design violated the mandatory ventilation standards for underground nonmental mines. During the period in question complainant was assigned the task of making a study of the options (tradeoffs) available from an engineering standpoint with respect to the design of the subsurface ventilation system that would be needed in three nuclear waste depositories to be constructed in underground salt domes at sites to be selected in the states of Mississippi, Utah, and Texas.

The Secretary of Labor denied complainant's claim on the ground his

employment did not involve work in a "coal or other' mine as defined in the statute or, if it did, the action was not protected because MSHA does not regulate pre-construction mine activity.

The matter is before me on respondent's motion to dismiss or, in the alternative, for summary judgment. Complainant opposes and cross moves, over respondent's objection, for summary decision on the issue of liability. There is also before me a motion for an order denying complainant's request for the production of documents, or, in the alternative, for a protective order. The documents in question were, produced for my in camera examination.

Statement of The Case

Complainant, a native of India, was employed as a mining engineer by

respondent, PB/PB-KBB, a world-wide consortium of architect/engineering concerns, with domestic offices in New York and Houston, Texas. During the period July-August 1982 complainant was assigned to a project in the joint venture's Houston office known as the Experimental Shaft Facility (ESF). His specific assignment was to make a trade-off study for the subsurface ventilation system of the ESF.

This assignment, which led to Mr. Paul's alleged discriminatory discharge, was performed under a contract between PB-KBB and the Battelle Memorial Institute, Project Management Division (BPMD). BPMD was in turn prime contractor for the Department of Energy (DOE) under the Nuclear Waste Policy Act, 42 U.S.C. §10101, et seq., for the National Waste Terminal Storage (NWTS) and Nuclear Waste Isolation

(NWI) programs.

Complainant alleges that his work on the tradeoff study for the subsurface ventilation system -- a necessary part of the preliminary design work for the ESF -- brought him within the protection afforded miners by the section 105(c)(1) of the Mine Act. The conceptual and functional design criteria furnished complainant by respondent and BPMD required the ventilation system comply with the mandatory safety standards for underground metal and nonmetal mines set forth in 30 C.F.R. Part 57. During the course of his tradeoff study, i.e., identification of the options available to meet BPMD's design criteria, Mr. Paul concluded there were inconsistencies and conflicts between Bettelle's design criteria and the ventilation standards for underground mines set forth in Part 57. He brought these conflicts and discrepancies to the

attention of his superiors who did not agree with his interpretation of the standards. This disagreement allegedly led to a refusal on Mr. Paul's part to proceed further with directions to reconcile the perceived differences and eventually his removal from the project and discharge.

Mr. Paul alleges his termination and respondent's subsequent refusal to rehire him as well as its alleged wrongful interference with his attempts to obtain other employment were in reprisal for reporting that acceptance of the BPMD design criteria would violate the mandatory safety standards and create a danger that the ESF would be constructed in a manner hazardous to the safety of employees required to work in such a facility.

Respondent does not deny that Mr.

Paul's position with respect to the applicability of the mandatory standards to the ESF may have played a part in the decision to terminate him. Nevertheless, it is claimed the true reason for his removal was his lack of productivity and competence. It is further claimed that Mr. Paul's position with respect to the options available to meet the standards was a part of his demonstrated incompetence because a competent mining engineer should have been, and allegedly was, able to reconcile the claimed discrepancies to the satisfaction of MSHA.

Applicable Substantive Law

Under controlling decisions of the Commission and the courts, in order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complainant bears the burden of production and proof to show (1) that he

engaged in protected activity, and (2) that an adverse action against him was motiviated at least in part by the protected activity. In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with respect to the affirmative defense. Nevertheless, the ultimate burden of persuasion that unlawful discrimination occurred does not shift from the complainant. Mooney v. Sohio Western Company, 6 FMSHRC ___, decided March 7,

1984 citing Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom., Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982); NLRB v. Transportation Management Corp., ___U.S.___, 76 L.Ed.2d 667 (1983); Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983).

The Motion To Dismiss

With respect to the threshold question of coverage or standing, the undisputed facts show respondent's Houston office, where complainant worked and where the alleged protected activity occurred was a "facility" that contained "other property" both personal and intellectual including "equipment, machines, tools" and other scientific devices and data common to the practice of the profession of civil

engineering. The facts further show that this "facility" and the "other property" located therein were "to be used" and, in fact, "were used" by complainant and other mining engineers employed by respondent to produce an engineering design for Battelle and the DOE that "was to be used in the work of extracting minerals from their natural deposits." I conclude therefore that respondent's Houston office was a "mine" within the literal meaning of section 3(h)(1)(C) of the Mine Act. Since complainant meets the statutory definition of a miner, i.e., "any individual working in a coal or other mine" he is entitled to mintain this action.

This does not mean that for other reasons complainant's action may not be jurisdictionally barred. 1/ What it does mean is that I do not agree with respondent's argument or the Secretary's determination that complainant was not a "miner" within the meaning of Section 105(c)(1) by virtue of his employment in respondent's Houston office.

Respondent says this is absurd. Absurd it may be, but on the basis of the plain language of the statute and it legislative history as well as the well-pleaded allegations of the complaint

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1/ I leave for further factual development the arguments pro and con that claim that respondent's activities were not in or did not affect commerce.

as supplemented by the depositions and documentary exhibits produced, I feel compelled to deny the motion to dismiss. I am mindful that in considering the sufficiency of a complaint in the context of a motion to dismiss, the trial judge must treat all well-pleaded allegations as true. Furthermore, a complaint should never be dismissed for insufficiency unless it appears to a certainty that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 22 L.Ed. 80 (1957); Donovan v. R. D. Andersen Constr. Co., 552 F.Supp. 249 (D. Kan. 1982).

It may be that, as the Secretary asserts, MSHA's regulatory authority does not reach pre-construction activity. Nevertheless, I find no necessary connection between the limits on MSHA's power or authority to make physical

inspections and the reach of the regulatory protection afforded individuals employed in a "mine" as that is defined in the statute. It is axiomatic that sound engineering is as essential to the health and safety of miners as education, training or MSHA's enforcement of the mandatory standards. The very fact that MSHA admits to an inability to police adequately the conduct involved in Mr. Paul's claim argues strongly for allowing Mr. Paul to proceed, at least at this stage, under the private attorney general authority of section 105(c)(3). As the Courts have noted:

> Safety cost money. The temptation to minimize compliance with safety regulations and thus shave costs is always present. The miners are both the most interested in health and safety protection, and in the best position to observe compliance or noncompliance with safety laws.

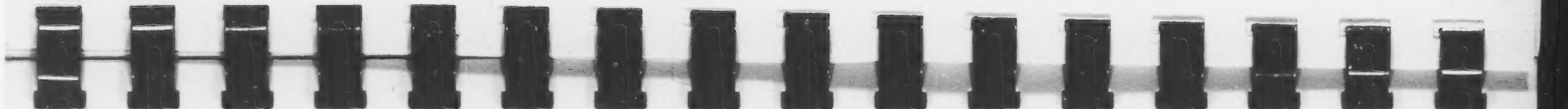
> Sporadic federal inspections can never be frequent or thorough enough to insure compliance. Miners who insist on health and safety rules being followed even at the cost of slowing down production, are not likely to be popular with mine foremen or top management. Only if miners are given a realistically effective channel of communication re health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced. Phillips v. IBMA, 1 MSHC 1154, 1158, 500 F.2d 772 (D.C. Cir. 1974), cert. den. 420 U.S. 938 (1975)

I fully understand that respondent's Houston office bore none of the traditional indicia of a "mine" as that is generally conceived and understood by

MSHA. It had no I.D. number, nor, indeed, did Mr. Paul have an I.D. number. And I am satisfied that Mr. Paul had never received either "new" or "experienced" miner training as required by section 115 and Part 48. But just as it seems that few mine hazards are presented in the engineering offices of other, more traditional, operators so also were they absent from respondent's Houston office. As I review the matter the law was intended not only to preclude "building in" hazards at the construction site but also at the design site. Otherwise, why the requirement that the design comply with the mandatory standards.

I would also agree that ordinarily no one would think of PB/PB-KBB as a mine operator, although to the extent it performed or proposed to perform the conceptual design work and to prepare the engineering drawings and specifications for

the actual construction as well as to oversight and inspect construction work at the three ESF sites it may well come within the definition of an "operator-independent contractor" as set forth in section 3(d) of the Act, 30 C.F.R. Part 45. The statute and the regulations define an "independent contractor" as "any person" other than a production operator "that contracts to perform services or construction at a mine." §45.2(c). Here the undisputed facts show respondent contracted with the production operator, Battelle and the DOE, to perform the necessary engineering service involved not only in the design but also the construction of the three Experimental Shaft Facilities. Thus, unless the three Experimental Shaft Facilities are not to be considered a "mine," it would appear that whether or not respondent was a "production operator" or



its Houston office was a "mine" within the meaning of section 3(h) of the Act it could be held responsible as an independent contractor for violations of the Act or standards committed by its "employees." §45.1 2/

There is no requirement, of course, that respondent be an "operator" or an

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2/ One Commentator has noted that because of the broadened protection against illegitimate retaliation or reprisal afforded under the 1977 Mine Act, "it now appears possible for a mine operator to discriminate against persons who have never been employed by the operator, who have never been employed as a miner, and who do not seek to be employed as a miner." Biddle, 1 Coal Law & Regulation §14.09[2] (1983).

"independent contractor" in order to violate section 105(c)(1) of the Act. The statute states that "no person" shall engage in discrimination. This language, according to the legislative history was intended to prevent discrimination both by mine operators as well as "by any other person directly or indirectly involved" in a reprisal action. S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977). In Local 9800, UMWA v. Secretary, 2 FMSHRC 2680 (1980) the trial judge held MSHA officials can be held liable for violating section 105(c)(1). In denying the Secretary of Labor's motion to dismiss on the ground that he and MSHA were not mine operators the trial judge stated:

> The Federal Mine Safety and Health Act seeks to ensure that all persons involved in operating a mine are safety-conscious and safety-oriented in every task they

perform. Just as the NLRB aims to promote an atmosphere conducive to free choice, so the Commission and MSHA aim to promote an atmosphere conducive to safety and good health. Such an atmosphere must be receptive to complaints concerning dangerous conditions. Complainant has alleged facts which, if true, could be shown to pose a risk that such conditions might go unreported. Id. at 2684.

I also find relevant the fact that under the 1977 Mine Act the class of persons protected was broadened to include all "representatives of miners." The Act, itself, does not define the term "representative of miners" but the Secretary of Labor has promulgated regulations that recognize that "any person" who acts on behalf of "two or more miners at a coal or other mine for the purposes of the act" has the status of a

"representative of miners." 30 C.F.R. § 40.1(b)(1). Further, section 105(c)(1) provides that "any statutory right afforded by this Act" may be exercised by a "representative of miners" on "behalf of himself or others." While Mr. Paul had not registered as a "representative of miners," he does allege that he was acting not only on behalf of himself 3/ but also of "others" who were involved with his project and who, if he were correct, might be held civilly or criminally liable for knowingly or willfully "authorizing, ordering or carrying out" violations of the Act or standards. And while this is not entirely clear, he indicated he was acting

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3/ Apparently, he feared personal liability under section 110(c) and (d) of the Act.

to protect individuals who might be employed by Battelle or the DOE to work in the ESF's for which his design was intended.

There is no dispute about the fact that the alleged dangers or violations that Mr. Paul reported created no hazard or danger imminent or otherwise to him or his immediate colleagues in respondent's Houston office. Indeed Mr. Paul's fears and contentions with respect to the claimed conflicts between the conceptual design proposed by Battelle and what he believed the mandatory standards required presented no immediate or long-range hazard to anyone unless the allegedly defective design concept was embodied in the plans, drawings, and specificatin for construction of the ESF. Thus, it may be that the evidence will show Mr. Paul's "alleged dangers' or "violations" were too speculative to justify his refusal to

follow the instructions of Mr. Steiner, Mr. Lepardo, or Mr. Mirza and get on with the work of completing the tradeoff study. Compare Philip Cameron v. Consolidation Coal Company, 4 FMSHRC 2205 (1982), appeal pending with; Danny H. Bryant v. Clinchfield Coal Company, 4 FMSHRC 1380, 1421 (1982). (Any claim of protected activity that is not grounded on an alleged violation of a health or safety standard or which does not result from some hazardous condition or practice existing in the mine environment for which the operator is responsible falls without the penumbra of the statute.)

But since Mr. Paul did report, by chapter and verse, twelve (12) standards which he believed were violated by the conceptual design furnished by Battelle this is obviously not a pure refusal to

work case. I recognize that Mr. Steiner, the project manager, responded to Mr. Paul's contentions. A copy of that memorandum, dated October 12, 1982, has been produced for my in camera examination. Because I have not heard respondent's argument on why this document is privileged I will not detail its contents. Suffice it to say that it establishes a concern by Mr. Steiner over the consistency of Battelle's Functional Design Criteria, Conceptual Designs and Test Plan Requirements with the MSHA standards. It also indicates that until that time MSHA had not been consulted with respect to the manner in which these conflicts or inconsistencies should be resolved. The parties divergent view on these issues cannot properly be resolved, however, on a motion to dismiss.

The assertion that the complaint was filed out of time is without merit.

The undisputed facts show MSHA did not send a formal letter of "declination of prosecution" until May 10, 1983 and that the complaint was filed with the Commission on May 31, 1983. This filing was well within the 30 days permitted under the Act.

It is true that in November 1982 and January 1983, the solicitor issued interim determinations with respect to coverage questions and suggested Mr. Paul "consult private legal counsel" for "other legal remedies." But it was not until receipt of the letter of May 10, 1983, that Mr. Paul was advised of MSHA's final declination and of his right to bring suit under section 105(c)(3) of the Act.

The legislative history and the Commission's decisions show that time periods for the filing of complaints under

section 105(c) are not jurisdictional and are subject to waiver "where the filing of a complaint is delayed under justifiable circumstances." Sen. Rpt. 95-181, 95th Cong., 1st Sess. 36-37 (1977); Joseph w. Herman v. IMCO Services, 4 FMSHRC 2135 (1982). Timeliness questions must, of course, be resolved on a case-by-case basis, taking into account the unique circumstances presented. The unique circumstances here support the view that MSHA did not believe that its communications to Mr. Paul in November 1982 and January 1983 "officially notified Mr. Paul of a declination of his complaint and his right under the Mine Act to file on his own behalf within 30 days of the declination." Ltr. from Thomas A. Mascolino, Counsel, Trial Litigation to trial judge dated December 15, 1983.

Under these circumstances, I am unable to conclude that Mr. Paul knowingly

failed to exercise his rights within the statutory time set forth in section 105(c)(3) of the Act. Compare David Hollis v. Consolidation Coal Company, 5 FMSHRC 21 (1984); Walter A. Schulte v. Lizza Industries, Inc., 6 FMSHRC 9 (1984).

The Motions For Summary Decison

The recitation of the parties' positions, as set forth above, makes apparent the impropriety of attempting to grant either of the cross motions for summary decision. On the merits, this proceeding presents several triable issues of fact and novel questions of law. One of the questions of law has been decided, namely, that Mr. Paul has standing to maintain this action. The others must await further factual development.

For example, was Mr. Paul's good faith reasonable belief that his interpretation of the criteria and standards was correct enough to establish a prima facie case of protected activity. On the other hand, if respondent's interpretation of the standards was arguably correct did Mr. Paul have a professional obligation to proceed and to continue to seek a professional resolution of the matter or to propose alternatives to the impasse. Did Mr. Paul's conduct constitute an unacceptable disruption of the project that threatened its timely performance. The present record indicates it was not until Mr. Paul made his disagreement with Steiner known to BPMD that respondent's project manager agreed to consult MSHA with respect to the discrepancies noted by Paul. Why did respondent fail to consult with MSHA before deciding that Paul's position was so arbitrary as to warrant his summary

termination? On the other hand, why didn't Paul call in MSHA when he knew his job was in jeopardy? Why was MSHA so reluctant to resolve the questions raised by Paul once it did enter the matter? To what extent did Mr. Paul's infelicity with the American language, idiom, customs and laws hinder communication of his true concerns to respondent?

What truth is there to Paul's claim that after he was discharged respondent denied him reemployment and disparaged his efforts to obtain employment elsewhere in reprisal for his alleged protected activity. What truth is there to the charge that to this day Paul has been unable to find employment in his profession because of respondent's vindictive attitude toward his alleged protected activity?

These and a host of other questions cry out for answers and show there are genuine issues of fact in dispute which make inappropriate the granting of either party's motion for summary decision.

The Motion For Production

At the first hearing in this matter last July, the trial judge took under advisement respondent's general objections to complainant's motion for the production of documents or, in the alternative, for a protective order. Since then respondent has produced a large volume of documents for the trial judge's in camera inspection. The trial judge believes that once they are made a matter of record he will be prepared to rule on respondent's specific objections. To facilitate this disposition, respondent will be expected to furnish promptly for the record its identification of each document the

production of which is objected to together with a statement of the specific legal and factual basis for the objection, or for a protective order. Thereafter, complainant will be afforded an opportunity to respond and to show why each document objected to is relevant and material to establishing its prima facie case. The matter of document discovery will ultimately be resolved on oral argument at a prehearing/settlement conference to be set in June.

Order

The premises considered therefore it is ORDERED:

1. That respondent's motion to dismiss for lack of standing or timeliness be, and hereby is, DENIED;

2. That the parties' cross motions for summary decision be, and hereby are, DENIED;

3. That on or before Monday, May 14, 1984, respondent file its objections to the production of documents or for a protective order;

4. That on or before Friday, June 1, 1984, complainant file its response to the objections to its motion for production; and

5. That this matter be, and hereby is, set for argument on respondent's objections to production at a prehearing/settlement conference to be held on Tuesday, June 12, 1984, commencing at 9:30 a.m., in the Hearing Room, Office of Administrative Law Judges, 5203 Leesburg Pike, Arlington, Virginia.

Joseph B. Kennedy

Administrative Law Judge

(703) 756-6210